Further meaningful response is not possible. GTE has provided no precedent -- and no persuasive logic -- to support the bizarre construction of Section 203(c) it would have the Commission embrace.

IV. GTE's Argument That The Filed Rate Doctrine Bars Recovery Of Civil Contract Damages Is Patently Untenable

Under the rubric "filed rate doctrine," GTE appears essentially to restate its earlier position that filed tariffs exclusively govern carrier-customer relations, but with a further variation here: that all of Apollo's conduct vis-à-vis GTE is limited by reference to tariff, even to the exclusion of civil suit damages recovery. (Motion, pp. 9-12.) In light of the facts here, the carrier's latest theory is demonstrably meritless.

In Wegoland, Ltd. v. NYNEX Corp., 806 F.Supp. 1112, 1115 (S.D.N.Y. 1992), the court identified

> . . . two companion principles [that] lie at the core of the filed rate doctrine: first, that legislative bodies design agencies for the specific purpose of setting uniform rates, and second, that courts are not institutionally well suited to engage in retroactive rate-setting.

The court designated these two core principles as the "anti-discrimination strand" and the "non-justiciability strand." Id.

In U.S. Wats, Inc. v. American Tel. & Tel. Co., No. CIV.A. 93-1038 (E.D.Pa. Apr. 5, 1994) (Lexis, Genfed Library, Dist. file), the court characterized the usual litigation circumstances involved in each instance:

> . . . In a typical discrimination case, the plaintiff is a customer of a regulated carrier seeking to avoid payment of the filed rate on the ground that it was quoted some lower rate by the regulated carrier. In such a situation, courts

> have consistently held that a regulated carrier must charge the tariff rate established with the appropriate regulatory agency, even if it has quoted or charged a lower rate to a customer. . . .
>
> . . . .
>
> By contrast, in a typical justiciability case, the plaintiff contends that the tariff rate itself was unreasonably high due to some alleged wrongdoing on the part of the common carrier and asks the court to retroactively determine a reasonable rate by assessing how much the defendants had inflated the rate through their alleged wrongdoing. . . . In such a case, "the filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." . . . Adhering to the nonjusticiability principle, most courts have held that the filed rate doctrine mandates dismissal of any claim that challenges a tariffed rate because regulatory agencies' primary jurisdiction over the reasonableness of rates must be presented. [Id. at *8; citations and footnote omitted.]

Because it is unreported, and since the court's discussion is both well-reasoned and instructive here, a copy of the decision is appended hereto as Attachment 8.

As in U.S. Wats, neither circumstance is present here. Apollo's civil suit asserts that GTE's refusal to make available to it the second half of the Cerritos system bandwidth at fair market rent was a contract breach, resulting in injury to Apollo. As it proceeds, that action will ascertain the parties' mutual undertakings and responsibilities in their earlier agreements, whether GTE breached its obligation(s) to Apollo, whether Apollo was injured and, if so, to what extent. Nothing in Apollo's suit involves a challenge to the reasonableness of GTE's Transmittal No. 909 charges to GTE Service Corp. (Wegoland's "anti-discrimination strand"). Moreover, since Apollo is not now using or paying for

the bandwidth tariffed to GTE Service Corp., its civil action does not seek -- and cannot result in -- damages based on a difference between current tariff charges to GTE Service Corp. and some lesser charge Apollo might have been paying if that bandwidth had been made available to it under the parties' Lease Agreement (Wegoland's "non-justiciability strand"). The measure of damages, reflected in Apollo's amended Complaint, will be based on lost business opportunities, breach of covenants of good faith and fair dealing, breach of non-competition provisions and interference with business relationships.

The mere fact that any tariff exists which relates to the bandwidth involved in the GTE/Apollo contracts does not in itself trigger any filed-rate doctrine concerns. Indeed, GTE's position here is essentially the same as the AT&T position specifically rejected in U.S. Wats -- where (unlike the tariff for GTE Service Corp. here) the tariff involved was one which directly applied to the plaintiff seeking damages:

> In this case, AT&T claims that the filed tariff doctrine precludes U.S. Wats' breach of implied-in-fact contract claim because "AT&T cannot owe U.S. Wats any non-tariff obligation." . . . According to AT&T, because "the filed Tariff and only the filed Tariff governs the relationship between AT&T and U.S. Wats . . . . if the obligation is not in the tariff, it cannot be 'implied,' in fact or in law." . . .
>
> The court does not agree. AT&T interprets the filed tariff doctrine too broadly. Its contention that "the filed tariff doctrine precludes the existence of any contract, whether express or 'implied in fact,' other than the tariff," . . . is not bolstered by the case-law cited in support thereof . . . . [Id. at *13.]

Neither of the cases relied on by GTE (Motion, pp. 9-10, 11-12) -- Marco Supply Company, Inc. v. American Tel. & Tel. Co., 875 F.2d 434 (4th Cir. 1989), and Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922) -- govern here. In Marco, an AT&T representative entered into an agreement with the customer/plaintiff specifying a lower rate than that contained in an already-filed tariff. The Fourth Circuit affirmed a District Court dismissal of the customer's suit to enforce the lesser charge, holding that the published charge prevailed over the parties' private agreement, particularly since the customer was by law presumed to know the published rates. Here, there is no tariff (approved or otherwise) governing Apollo's use of the second half of the Cerritos system bandwidth; perforce Apollo is not seeking some contract rate which varies from such a tariff. Rather, Apollo seeks damages for GTE's refusal to make that bandwidth available to Apollo pursuant to the parties' agreements.

While GTE also places significant reliance on Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922), the case which introduced the filed rate doctrine, the U.S. Court of Appeals for the Second Circuit has distinguished Keogh and held it inapplicable to cases such as this, where the plaintiff does not seek to have the court determine even indirectly what a reasonable rate would be, notwithstanding the existing tariffed rate. Litton Systems, Inc. v. AT&T, 700 F.2d 785, 820 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984). In so doing, the Court specifically held that a plaintiff's recovery of damages on an antitrust claim did not

constitute a "preference" in violation of Section 203(c) of the Communications Act.[20/]

As in Litton, Apollo's case before the California court does not allege that the rates contained in GTE's tariff for GTE Service Corp. are unreasonable; it alleges that GTE breached its contract by refusing to make the bandwidth available to Apollo, and by tariffing its provision of the bandwidth in a manner inconsistent with the contract. Application of Keogh and the filed rate doctrine is therefore inappropriate here.

The court in Gelb v. American Tel. & Tel. Co., 813 F.Supp. 1022, 1028 (S.D.N.Y. 1993) observed that the Supreme Court "has not recently expressed an inclination to extend the filed rate doctrine

---

[20/] In Litton, the plaintiff, a manufacturer of certain telephone terminal equipment and a competitor of AT&T in the equipment manufacturing business, had alleged antitrust violations by AT&T arising from AT&T tariffs which required that equipment purchased from vendors other than AT&T be connected to AT&T's facilities only through a "black box" manufactured and sold by AT&T. 700 F.2d at 789. The tariffs at issue had been filed with, but never approved by, the Commission. During the pendency of the tariffs, however, AT&T vigorously opposed the Commission's adoption of certification standards for terminal equipment which would obviate the need for the tariffs if adopted.

In the District Court, the jury awarded Litton $90 million in damages, and AT&T appealed. AT&T's tariffs were ultimately rejected by the Commission -- the Commission found that the black box device was unnecessary to protect AT&T's facilities; but Litton alleged that AT&T's opposition to the adoption by the Commission of certification standards and the de facto application of AT&T's tariffs before the certification standards were finally adopted were sufficient to drive Litton out of business. Id. at 789-90.

On appeal, AT&T argued that under Keogh, application of the filed rate doctrine was appropriate, and barred Litton's claim that application of the tariffs' requirements harmed it. The Second Circuit distinguished Keogh and the cases that applied it from the facts in Litton on the ground that "the issue here is not the reasonableness of the interface [i.e., black box] tariff rate as compared to some other rate that might have been charged, but instead whether the [black box] requirement itself was reasonable, i.e., whether there should have been any charge at all." Id., at 820. The Court concluded that the concern in Keogh as to the potential interference of the plaintiff's antitrust claim with the regulatory system devised to establish reasonable rates was not implicated in the case before it. Id. at 821.

beyond contexts clearly implicating the anti-discrimination or non-justiciability rationales for the rule." GTE's invitation to the Commission to dramatically extend the filed rate doctrine beyond all recognizable bounds should be summarily rejected.

CONCLUSION

GTE's proposition -- that an Apollo recovery of civil damages from the carrier would represent an unlawful "rebate" under Section 203(c) of the Act -- is untenable on its face, and wholly unsupported. Moreover, the presentation of that meritless contention at this time is but a further maneuver in GTE's civil litigation strategy. Apollo urges the Commission to summarily dismiss GTE's Motion at the earliest possible time.

Respectfully submitted

APOLLO CABLEVISION, INC.

By: 

Edward P. Taptich
Kevin S. DiLallo
Anne M. Stamper
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February 23, 1995

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

COPY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

COURTROOM 31 HON. BARBARA A. LANE, JUDGE

APOLLO CABLEVISION, Inc., a California Corporation; Plaintiff, vs. GTE CALIFORNIA, INC., a California Corporation, and DOES 1 to 50, inclusive, Defendants.	)	No. CIV 142800

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, January 24, 1995

APPEARANCES:

For Plaintiff: SMITH, HELENIUS & HAYES
BY: CARL E. HAYES
BY: CHRIS DUENOW
1880 Santa Barbara Street
San Luis Obispo, California 93406

For Defendant: PILLSBURY MADISON & SUTRO
BY: PATRICK G. ROGAN
BY: DOUGLAS H. DEEMS
BY: SYBILLE DREUTH
725 South Figueroa Street
Suite 1200
Los Angeles, California 90017

Also Present: JOHN F. RAPOSA, ESQ.

Reported by: KATHY L. TILLQUIST, CSR 9859
Certified Shorthand Reporter

I would point out is that both Apollo and GTE are regulated entities. As much as they deliver services over the wires and wireless, they are both subject to federal regulation. They are both directly covered by the FCC. They are not third parties to one another nor third parties to the FCC. They are both directly regulated entities.

In essence, what Apollo is asking the Court to do by indirect means is permit them to go forward on the contract actions, say that there is a difference between the contract rate and the rate that would be the regulated rate under tariff, and have them maintain an action for damages for whatever differential there may be. Were they to do that, that is a direct violation of Rule 203 because that, in effect, would be a rebate to Apollo and differentiation in treatment between them and other customers receiving like service.

If they were permitted to obtain rebates in that fashion, that would be something which would entirely disrupt the entire federal scheme of delivery of services of regulated entities on a tariff basis in fairness to all potential customers who should be treated and accorded the same fashion.

There are two cases which were referred to by Judge Wilson when he returned the matter to this Court which bear comment. One, the Court may have read. If I'm interpreting the Court's indicated ruling correctly, that's the Carroll case, Regents of the University of Georgia v. Carroll. I would point out one thing that wasn't apparent

to Judge Wilson because he wasn't -- he was determining, the matter wasn't appropriate in federal court not that it didn't apply to the defense but federal law applied. But when he had his clerks do the research, he turned up a case from the '50s which was the Carroll case. And that case discussed whether or not there was a power of courts to make awards under contracts that perhaps conflicted with FCC rules.

The problem with that case is, that case and the comments regarding it centered around the licensing power of the FCC. That is all the FCC had in the '50s was a power to either license or perhaps impose criminal sanctions if you really did something wrong. Since then, in 1964, congress greatly expanded the power of the FCC to issue regulations and to govern parties not only directly under their control such as Apollo and GTE, but also even to affect the interests of nonparties and third parties who come into play.

If the Court reads two cases, the Court can see and compare how Regents-Carroll has changed since that day. And that's one of the other cases that was cited by Judge Wilson, that being the City of Peoria versus GE Cablevision. 690 Federal 2d at 116. Also the Buckeye Cablevision versus FCC case from 1967, both of these being after the amendment. And in Buckeye, the Court pointed out there that regarding the Regents of Georgia versus Carroll matter, the Supreme Court held, the commission's duty to effectuate the public interest requirements of subchapter three centered around

its licensing power which does not encompass the abridgement of contracts between licensees and third parties. But the Buckeye Court pointed out that the Court's view of this limitation was based largely on the agency's lack of authority to issue cease and desist orders against licensees or anyone else to prevent violations of the act. And, subsequently, congress conferred the authority that I referred to a moment ago.

Here, unlike the Regents case, Apollo is not a third party such as was the case in Regents. They're a regulated direct entity under control of the FCC by virtue of the FCC Title II jurisdiction. Long ago, cable operators tried to argue in various courts that they weren't subject to FCC because they ran a cable from point A to point B in a city within a jurisdiction and didn't cross state lines. And, therefore, because they weren't over the airwaves, they weren't subject to federal regulation.

There are a ton of cases that say that that is not the case. There is well-established law that they are directly regulated. The city of Peoria case is also instructive. I'll read a short quote here, true Peoria -- this is a city -- the third party has nothing to do with the two regulated parties. Peoria was not a party to the rule-making proceeding. But 47 U.S.C. 405 requires nonparties to petition the FCC for reconsideration before they ask a Court of appeals to review an FCC order. And the policy behind this requirement, one of routing all channels and other orders of the FCC initially to the FCC, is equally

MR. HAYES: They wrote a letter, Mr. Rogan. I gave a copy of it to the Court that said they did not want to have a copy of the procedure. I think they sent a copy to your office.

MR. ROGAN: I think the only way to bring the FCC's position to the Court is by reference on the pleadings they turn in in federal court respecting their attitude toward this whole affair. And I'm happy to do that at the appropriate time.

THE COURT: All right. At this point in time, it appears to the Court, looking at the face of the pleading and not being permitted to -- although I have read them, consider letters and other documentation that the plaintiff in this action is not challenging any FCC ruling or commissioned ruling. The FCC is not concerning itself with any private matters regarding the contract between the plaintiff and defendant from what I can see except to the extent that it wanted to be briefed on how the tariff affected the contract. So at this point in time, I find no grounds to stay the action pending the outcome by the FCC. I would encourage you, if you're going to pursue this here --

Are you planning on a jury for your tort and contract causes of action, Mr. Hayes?

MR. HAYES: Yes, Your Honor. We requested one before the district court, and at the appropriate time we will renew that request.

THE COURT: Okay. This is practically a cow county;

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA
MINUTE ORDER

CASE NO: CIV142800 APOLLO CABLEVISION VS GTE CALIFORNIA INCORPORATE
DATE: 01/24/95 TIME: 3:30 DEPT: 31

MOTION RE: FOR JUDGMENT ON THE PLEADINGS OR TO STAY PROCEEDIN GS BY GTE CALIFORNIA INCORPORATED

Honorable BARBARA A. LANE, Judge presiding. Clerk: YVONNE Y. MEDINA. Court Reporter: Kathy Tillquist.

APOLLO CABLEVISION INC.; A CALIFORNIA CORPORATION present by counsel Carl Hayes and Chris Duenow.

GTE CALIFORNIA INCORPORATED; A CALIFRONIA CORPORATION present by counsel P. Rogan; S. Dreuth; D. Deems & J. Raposa.

Matter submitted to the court with argument.

The court having considered argument of counsel will treat this Judgment on the pleadings as a demurrer and makes the following orders:

Demurrer to COMPLAINT of APOLLO CABLEVISION INC. as to GTE CALIFORNIA INCORPORATED; A CALIFRONIA CORPORATION overruled.

Counsel stipulate: Plaintiff may file First Amended Complaint.

Plaintiff has represented he will file his amended complaint on 1-25-95.

Defendant's motion to stay proceedings is denied.

Defendant is directed to file an answer by 2-24-95.

(S) Further Status Conference re: FILING OF AN ANSWER AND JOINT STATUS REPORT is set for 03/03/95 at 8:10 in Courtroom 22B. C/MG

Counsel for plaintiff is given a joint status report. Counsel is advised all questions on the joint status report must be answered in detail and completed by all parties. Failure to comply with the meet and confer and demand and offer portions of the joint stauts report will result in mandatory sanctions in the amount of $250 as to each non-complying party. NO APPEARANCE IS REQUIRED IF THE JOINT STATUS REPORT AND ANSWER ARE FILED FIVE DAYS PRIOR TO THE HEARING; OTHERWISE APPEARANCE IS MANDATORY TO STATE REASONS FOR ANY CONTINUANCES. C/MG

SHEILA GONZALEZ, Court
Executive Officer and Clerk

By: YVONNE MEDINA
Judicial Assistant

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

VENTURA COUNTY
SUPERIOR AND MUNICIPAL COURTS
FILED
JAN 27 1995
SHEILA GONZALEZ, Superior and Municipal Courts Executive Officer and Clerk
BY: _____, Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

APOLLO CABLEVISION, INC., a California corporation,

Plaintiff,

vs.

GTE CALIFORNIA INCORPORATED, a California corporation; GTE SERVICE CORPORATION, a California corporation; and DOES 1 to 50, inclusive,

Defendants.

CASE NO. CIV 142800

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

FILED JAN 27 1995

D.C.M. TRACK ASSIGNMENT
☐ UNLAWFUL DETAINER
☐ EXPEDITED
☐ ECONOMIC
☒ STANDARD
☐ UNINSURED MOTORIST
☐ TRACK COORD TO NOTIFY

ASSIGNED COURT
31 Gone

COMES NOW PLAINTIFF AND ALLEGES:

1. Plaintiff APOLLO CABLEVISION, INC. (hereinafter "Apollo") is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California.

2. Defendant GTE CALIFORNIA INCORPORATED (hereinafter "GTE") is, and at all times herein mentioned was, a California corporation with its principal place of business and principal

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executive address in the City of Thousand Oaks, County of Ventura, State of California.

3. From December 31, 1952 up until June 28, 1988, defendant GTE had the name "General Telephone Company of California." On June 28, 1988, defendant GTE changed its name to its present usage GTE CALIFORNIA INCORPORATED.

4. Defendant GTE Service Corporation is an affiliate of and at all times material it was controlled by defendant GTE California Incorporated.

5. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does 1 - 50, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged.

6. In 1985, the City of Cerritos, California issued Requests for Proposals to build a cable television system for that city. At that time, most of the municipalities in the Los Angeles basin already had cable television networks, virtually all of which were built above ground. The City of Cerritos, however, sought an underground network with sophisticated interactive communications capabilities and additional unique and expensive requirements. These requirements made the anticipated costs of installing a cable network in Cerritos much greater than the cost of installing a traditional above ground network. As a result, most cable system construction

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companies were not willing to take on the risk of building the Cerritos system. For several years prior to the issuance of the 1985 Request for Proposals, the City of Cerritos had tried unsuccessfully to find a supplier to meets its requirements for a state-of-the-art system.

7. Both GTE and Apollo responded to the 1985 Requests for Proposals by submitting separate proposals to the City of Cerritos. These proposals were not accepted. Thereafter, at the suggestion of the City of Cerritos, Apollo and GTE entered into discussions to determine whether they could work out an arrangement which would accommodate their various interests and abilities and meet the requirements of the City of Cerritos. Apollo had experience, ability and interest in constructing and operating a cable television service system in Cerritos, but it did not have sufficient financial resources to finance the initial construction of the expensive system required by Cerritos, and it did not have the technical ability or the desire to provide interactive capabilities. GTE, through its affiliate, GTE Service Corporation, had been doing research on alternative communications technologies, including interactive technologies, and desired a site where it could test these technologies. GTE had financial resources sufficient to finance the expected construction costs of the system, but GTE did not have the know-how to cost effectively construct and operate a cable television system. Furthermore, applicable FCC rules prohibited telephone companies, such as GTE, from owning and operating cable television services.

8. In these discussions, GTE assured Apollo that it

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wanted to use the proposed Cerritos cable system for a relatively short period of time (i.e., 5 years or less) for purposes of testing new communications technologies and not for purposes of competing with Apollo's video programming. Based on these discussions, the parties entered into contractual arrangements whereby GTE was to finance and Apollo to design and construct an underground network of coaxial cable and fiber optic conduit in Cerritos so that GTE would own a sophisticated network through which it could test its new communications technology and Apollo would be able to operate a cable television system, which would include access to the full cable television capacity of the system after GTE, or GTE Service Corporation, concluded its tests.

9. On January 22, 1987, Apollo and GTE entered into a series of agreements which gave effect to these goals, including a Construction Agreement, a Design Agreement, and a Lease Agreement. In the Design Agreement and the Construction Agreement, GTE agreed to provide the financing for the design and construction of the system by paying Apollo's parent, T.L. Robak, Inc., to design and construct the system for both fiber optic and coaxial cable transmission. In the Lease Agreement, GTE agreed to lease the coaxial cable facilities of the System back to Apollo for the purpose of providing cable television services in Cerritos. GTE leased to Apollo 275 MHz of the bandwidth capacity of the coaxial cable facility, approximately half of the capacity of the cable, reserving the remaining capacity for GTE Service Corporation to engage in testing of new communications technologies. The parties considered

themselves joint venture partners, not potential competitors, and contemplated that the remaining bandwidth capacity would become available when GTE concluded its testing period, at which time Apollo would be allowed to take on the full capacity of the coaxial cable.

10. The Lease Agreement was subsequently amended on May 26, 1988, June 19, 1989, and May 3, 1991. The second amendment to the Lease Agreement ("Amendment No. 2") was precipitated by GTE Service Corporation's desire to have different decoders or converter boxes installed at customer locations throughout the Cerritos cable television system. Converter boxes convert or decode the information transmitted on the coaxial cable to a form that can be used by individual subscribers. Although the converter boxes that Apollo had installed were suitable for the video programming Apollo was providing, GTE Service Corporation desired more expensive and sophisticated converter boxes that would permit the transmission of certain experimental programming GTE Service Corporation was attempting to develop.

11. As originally provided under the Lease Agreement and the Construction Agreement, GTE owned the coaxial cable and fiber optic system located under public streets and easements in Cerritos, but Apollo owned the "drops," which connected individual houses, offices, and other buildings to the system, as well as the internal wiring in the customer's home or business, including the converter boxes. Neither the Lease Agreement nor any other agreement gave GTE the right to use Apollo's property to transmit signals to Apollo's customers. This ownership structure gave Apollo practical protection

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against competition from GTE. GTE could not compete with Apollo in providing video programming without making a considerable investment to install new drops and converter boxes to the individual customers.

12. In Amendment No. 2 Apollo agreed to cooperate with the desire of GTE and GTE Service Corporation to replace the existing converter boxes and to allow GTE to become the owner of the system all the way to the customer, including the converter boxes. In return, GTE gave Apollo, among other things, express assurances that GTE would not use its newly acquired ownership rights to destroy or infringe on Apollo's essential business objective and economic expectations of providing video programming to customers in Cerritos. In recital paragraph F, GTE expressly disclaimed any intent to use the decoders for the purpose of providing Video Programming and further agreed that the approach undertaken by the agreement was not intended to change Apollo's control over or essential economic expectations of providing video programming in Cerritos.

13. Consistent with these purposes, in paragraph 7(a) of Amendment No. 2, GTE explicitly agreed not to compete with Apollo for up to 22 years, as follows:

> GTEC agrees not to compete with Apollo, or any permitted successor or assignee, in the provision of Video Programming in the City during the term of the lease (including any extensions thereof not in excess of seven (7) years beyond the initial term).

14. In paragraph 8 of Amendment No. 2 GTE agreed to several provisions which, if observed by GTE, would have had the effect of assuring Apollo that it would be able to become

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and remain the sole provider of a full 78 channel cable television service in Cerritos. First, the parties restated and strengthened Apollo's right of first refusal to any excess bandwidth capacity by setting the price at which Apollo would be entitled to lease the excess bandwidth, which price was set at the then reasonable market rent for the additional bandwidth. Paragraph 8 of Amendment No. 2 provides that paragraph 21 of the Lease Agreement shall be amended to provide:

> (a) Owner [GTE] agrees that if bandwidth capacity in the Coaxial facilities in excess of 275 MHz should become available, Lessee, or its successor, is hereby granted a right of first refusal to the use of any such increase in capacity at the then reasonable market rent for such bandwidth.

GTE further agreed that if bandwidth capacity became available in GTE's Fiber Network Facilities, Apollo would similarly have a right of first refusal for any use of that facility for video programming at the then reasonable market rent for such bandwidth.

15. On November 16, 1989, Apollo, GTE, and GTE Service Corporation entered into further agreements regarding the exchange of converter boxes. In the "Enhanced Capability Decoder (Converter Box) Agreement" GTE Service Corporation agreed to pay Apollo certain specified costs associated with the installation of the converter boxes and also undertook other obligations. In particular, in paragraph 2(d) of the Agreement, GTE Service Corporation agreed not to compete with Apollo in the provision of video programming in Cerritos, using language virtually identical to GTE's non-compete agreement in

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paragraph 7(a) of Amendment No. 2 as quoted above.

16. Prior to November 16, 1989, neither GTE nor GTESC had offered experimental programming which competed with the programming Apollo offered on its cable television system. At that time, two of the new communications technologies that GTE Service Corporation desired to test in Cerritos were Video On Demand ("VOD") and Near Video On Demand ("NVOD"), both of which compete with the cable television services Apollo offered. GTE Service Corporation claimed that Apollo would be benefited by GTESC's offering of VOD and NVOD services through increased penetration, i.e., the portion of Cerritos residents choosing to subscribe to Apollo's basic service, but Apollo feared that the VOD and NVOD service might induce Apollo's subscribers to decline or discontinue special movie services, such as Home Box Office and Showtime.

17. On November 16, 1989, GTE Service Corporation and Apollo also entered into a Service Agreement under which Apollo agreed to permit GTE Service Corporation to provide VOD and NVOD services in Cerritos and to perform certain services in connection with that programming. The agreement further provided that if the provision of VOD and NVOD directly resulted in a decrease in Apollo's net revenues per subscriber, GTE Service Corporation would pay Apollo compensation in accordance with a set formula.

18. GTE Service Corporation's provision of VOD and NVOD services did in fact compete with programming offered by Apollo and directly resulted in a decrease in Apollo's net revenue per subscriber. GTE Service Corporation eventually agreed to pay

Apollo to compensate Apollo for lost revenues caused by competition from GTESC's VOD and NVOD services.

FIRST CLAIM FOR RELIEF

19. Plaintiffs reallege and incorporate herein by this reference, each and every allegation contained in paragraphs 1 through 18 of this complaint, as though the same were fully set forth herein.

20. There is and was implied in each of the contracts between plaintiff and defendants, a covenant by each party not to do anything which would deprive the other parties thereto of the benefits of the contract. This covenant of good faith and fair dealing imposed upon GTE and upon GTE Service Corporation a duty to refrain from doing anything which would render performance of the contracts impossible and a duty to do everything that the contract presupposed that they would do to accomplish their purpose.

21. Defendants have breached this covenant of good faith and fair dealing by (1) failing and refusing to rent the excess capacity on the coaxial cable that became available in or about July 1994 at the reasonable market rent for such excess capacity and (2) providing video programming to customers in Cerritos in direct competition with Apollo.

On or about July 29, 1993 plaintiff was notified in writing by GTE that an additional 275 MHz of bandwidth capacity in the coaxial facilities would become available in 1994, no later than July. GTE, however, failed and refused to comply with its obligation to give Apollo the opportunity to use such increased capacity at the then reasonable market rent.

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Instead, GTE offered Apollo the right to use this increased capacity only upon payment of a rental rate of $95,265.00 per month. $95,265.00 per month is not the reasonable market rent for such bandwidth capacity. Defendants have used this demand for an unreasonable rent to deprive plaintiff of the benefits of the contract and enable defendants to further breach its obligations by competing with plaintiff in the provision of video programming in Cerritos.

In July 1994 defendants broke off negotiations with Apollo and undertook to provide video programming to customers in the City of Cerritos in direct competition with Apollo, utilizing the 275 MHz of bandwidth in the coaxial cable that they refused to rent to Apollo at the reasonable market rent. Defendants voluntarily filed tariffs with the Federal Communications Commission, which tariffs sought to materially alter the contractual arrangement between Apollo and defendants and which sought to deprive Apollo of its right to acquire the excess bandwidth which came available in July of 1994.

22. At the same time GTE Service Corporation terminated its Service Agreement with Apollo. Despite this termination and written notice that any provision of video programming services in Cerritos after termination of said agreement would breach defendants' non-compete agreements, GTE Service Corporation continued to provide and is providing video programming in Cerritos in direct competition with Apollo. Moreover, defendants proposed in their tariff applications that GTE Service Corporation operate a video channel service including cable television and enhanced video service on the

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remaining one-half (1/2) of the bandwidth capacity not allocated to Apollo and in direct competition with Apollo in providing cable TV service to customers in the City of Cerritos. The actions of defendants in unilaterally and voluntarily filing tariffs containing provisions contrary to their contracts with Apollo and in repudiating their contractual obligations not to compete with Apollo in the provision of video programming in the City of Cerritos breached the covenant of good faith and fair dealing implied in each of the contracts entered into by and between plaintiff and defendants.

23. Plaintiff has performed all conditions, covenants, and promises required by it on its part to be performed in accordance with the terms and conditions of each of the contracts.

24. As a result of defendants' breach of the contracts, plaintiff has incurred damages and will incur damages in the future in an amount not presently ascertained, but substantially in excess of the minimal jurisdictional limits of this court.

SECOND CLAIM FOR RELIEF

25. Plaintiffs reallege and incorporate herein by this reference, each and every allegation contained in paragraphs 1 through 24 of this complaint, as though the same were fully set forth herein.

26. On March 4, 1987, the City of Cerritos, California, enacted an ordinance granting Apollo a non-exclusive contract for the construction, operation and maintenance of a cable

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